

Zarina bt Sharil & Anor v Chiong Chuan Hwa & Ors A

HIGH COURT (KUALA LUMPUR) — SUIT NO D8–22–186 OF 2008
KANG HWEE GEE J B
28 AUGUST 2008

Civil Procedure — Injunction — Mareva injunctions — Elements amounting to real danger of dissipation of assets — Whether illegal acts imputing dishonesty amounted to real danger of dissipation of assets — Whether acts contravened provisions of Banking and Financial Institutions Act 1989 C

Civil Procedure — Locus standi — Action for injunction — Whether non-party to agreement may sue on behalf of investors D

The plaintiffs' claim in this case was for the return of monies they had invested with the first defendant purportedly for and on behalf of a number of persons vide the respective agreements which they had signed with the first defendant. The plaintiffs also applied for a Mareva injunction to prevent the dissipation of the defendants' assets. The plaintiffs alleged that the first defendant, upon receiving the monies, had given it to the second defendant who used it to set up the third defendant company. However, the company had failed to pay each of the investors a certain percentage of their respective investment every month and return the initial investment sum invested with the company through the first defendant as per the agreement. The first defendant, in opposing the claim, contended that the plaintiffs failed to show that they could bring the proceedings for and on behalf of their purported friends as the plaintiffs were not the investors. The defendants further contended that there was no risk of dissipation of assets by the defendants and that the plaintiffs were making a unilateral wild assumption without any concrete proof. E
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Held, allowing the claim:

- (1) The plaintiffs' locus standi to sue in their names was not an issue to be decided at the interlocutory stage as the plaintiffs had also signed the agreements between the third defendant company and the numerous investors (see para 42). I

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(2) The plaintiffs' affidavit showed that certain dividends in respect of the deposits had not been paid when they were due and the guaranteed return of the principal sums invested was not returned to the investors as agreed in the agreements (see para 43).

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(3) The illegal conduct of the first defendant in imputing dishonesty gave rise to a real danger of dissipation and this contravened with s 25 of the Banking and Financial Institutions Act 1989. Further, the fact that both the dividends and return of the principal sum had not been paid and the evidence that monies taken from the deposits were invested in the share trading account in the name of the second defendant and her

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mother also gave rise to a real danger of dissipation (see para 50).

[Bahasa Malaysia summary]

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Tuntutan plaintiff dalam kes ini adalah untuk pengembalian wang yang telah mereka laburkan dengan defendan pertama kononnya untuk dan bagi pihak beberapa orang melalui perjanjian masing-masing yang telah mereka tandatangani dengan defendan pertama. Plaintiff-plaintif juga memohon untuk satu injunksi Mareva untuk menghalang penyusutan aset-aset

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defendan-defendan. Plaintiff-plaintif mendakwa bahawa defendan pertama, setelah menerima wang tersebut, telah memberikannya kepada defendan kedua yang telah menggunakannya untuk menubuhkan syarikat defendan ketiga. Walau bagaimanapun, syarikat tersebut telah gagal untuk membayar setiap pelabur sejumlah peratus daripada pelaburan masing-masing setiap

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bulan dan mengembalikan jumlah pelaburan permulaan yang dilaburkan dengan syarikat itu melalui defendan pertama menurut perjanjian. Defendan pertama, di dalam menolak tuntutan itu, berhujah bahawa plaintiff-plaintif telah gagal untuk menunjukkan bahawa mereka boleh membawa prosiding-prosiding kepada dan bagi pihak kawan-kawan mereka kerana

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plaintif-plaintif bukanlah pelabur-pelabur. Defendan-defendan seterusnya berhujah bahawa tidak terdapat risiko penyusutan aset-aset oleh defendan-defendan dan bahawa plaintiff-plaintif sedang membuat andaian melulu tanpa bukti yang kukuh.

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Diputuskan, membenarkan tuntutan:

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(1) Locus standi plaintiff-plaintif untuk menyaman di atas nama-nama mereka bukanlah isu yang perlu diputuskan di peringkat interlokutori kerana plaintiff-plaintif juga telah menandatangani perjanjian-perjanjian di antara syarikat defendan ketiga dan pelbagai pelabur (lihat perenggan 42).

(2) Affidavit plaintiff-plaintif menunjukkan bahawa sejumlah dividen berkenaan deposit-deposit tidak dibayar apabila telah sampai tempoh

dan pulangan yang dijamin ke atas jumlah pelaburan tidak dikembalikan kepada pelabur-pelabur seperti yang dipersetujui di dalam perjanjian (lihat perenggan 43).

- (3) Perbuatan tidak sah defendan pertama di dalam berlakunya tidak amanah telah membangkitkan bahaya sebenar penyusutan dan ini bertentangan s 25 Akta Perbankan dan Institut Kewangan 1989. Selanjutnya, fakta bahawa kedua-dua dividen dan pulangan jumlah prinsipal tidak dibayar dan bukti bahawa wang yang diambil daripada deposit-deposit dilaburkan di dalam akaun urusaniaga saham di bawah nama defendan kedua dan ibunya juga membangkitkan bahaya sebenar penyusutan (lihat perenggan 50).]

Notes

For cases on action for injunction, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4677–4679.

For cases on Mareva injunction, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3457–3534.

Cases referred to

Arthur Anderson & Co v Interfood Sdn Bhd [2005] 6 MLJ 239; [2005] 2 CLJ 889, CA (refd)

Jones & Saldanha v Gurney [1913] WN 72 (refd)

Lim Sung Huak & Ors v Syarikat Pemaju Tanah Tikam Batu Sdn Bhd [1993] 3 MLJ 527, HC (refd)

Lloyds Bowmaker Ltd v Britannia Arrow Holdings Plc [1988] 1 WLR 1337, CA (refd)

Rex v Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac [1917] 1 KB 486 (refd)

Wee Tiang Kheng & Ors v Ngu Nii Soon & Ors [1989] 1 MLJ 252, HC (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 s 25

Contracts Act 1950 s 183

Rules of the High Court 1980 O 29 r 1(2A), O 29 r 1(2A)(a), (b), (c), (d), (e)

Vinod Kamalanathan (Vinod Kamalanathan & Associates) for the plaintiffs. Christopher Lai King Lung (KH Yap with him)(Chris Lai Yap & Partners) for the defendants.

Kang Hwee Gee J (delivering judgment ex tempore):

[1] The plaintiffs' claim against the defendants is for the return of monies invested by the plaintiffs on behalf of numerous persons with the first

- A defendant in a scheme known as a 'hedge fund' vide a company known as Ocean Balance Ltd registered in the Cayman Islands.
- B [2] The second defendant is the girlfriend of the first defendant and a director of the third defendant company which the plaintiffs alleged had received the monies from the second defendant who had received the sum from the first defendant. The monies were used to set up the third defendant company.
- C [3] The total sum that the plaintiffs had paid to the first defendant amounted to approximately RM6.3m.
- D [4] Each of the numerous persons mentioned had signed an investment agreement with Ocean Balance Ltd (a company incorporated in the Cayman Islands) entitled 'OBL Subscription Agreement/Individual Investor'. The said company was the company which the first defendant had represented to the plaintiffs and the numerous persons at two presentations to whom the funds would be invested.
- E [5] Under the agreement signed with each of the investors, OBL was supposed to pay each of the investors in each agreement a certain percentage of their respective investment on 7 of every month.
- F [6] The agreement also provides for the guarantee of the return of the initial investment sum invested with OBL through the first defendant.
- G [7] OBL failed in making the payment, the monthly payment and also failed to return the capital 'upon maturity' as agreed in the agreement.
- [8] Various meetings were held between the investors, the plaintiffs and the first defendant to negotiate the return of the monies but in vain.
- H [9] At the meetings the first and second defendants had admitted that monies which the first defendant collected were used to set up the third defendant and in other companies one of which is called BDL Marketing which is owned solely by the second defendant and another is a timber business belonging to the second defendant's father.
- I [10] This suit is filed to recover the money and the application is for a Mareva injunction to prevent the dissipation of the defendants' asset.

SUBMISSION BY MR JAMES KHONG, COUNSEL FOR THE FIRST DEFENDANT: (VERBATIM)

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[11] The plaintiffs are claiming the monies for other persons whom they purport to be their friends. This is clear from the statement of claim which goes no further than that.

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[12] The plaintiffs were not investors themselves as they contend that they are only entitled to unpaid commission.

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[13] It is also clear that the sum of RM4,918,940 is a claim for investment monies and not for the plaintiffs' own commission. It is therefore unclear what interest the plaintiffs have in this suit if their only concern is the return of the investment monies of third parties who are not even parties in this suit. This is captured in the statement of claim paras 10, 25 and 28.

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[14] The first defendant's case is that the plaintiffs failed to show that they can bring this proceeding for and on behalf of their purported friends. See *Wee Tiang Kheng & Ors v Ngu Nii Soon & Ors* [1989] 1 MLJ 252 per Chong Siew Fai J approving *Jones & Saldanha v Gurney* [1913] WN 72 (refd) at p 254:

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On the evidence, Wee Tiang Kheng clearly was and is not a registered co-proprietor of the shophouse as alleged in the statement of claim. In *Jones & Saldanha v Gurney* [1913] WN 72 (refd) an attorney appointed under a power of attorney sued as a co-plaintiff. It was held that the statement of claim showed no cause of action in the attorney and that his name was improperly joined. It appears clear that a person authorised to sue and suing under a power of attorney on behalf of his principal has to sue in the name of the principal: *Jones & Saldanha v Gurney* [1913] WN 72 (refd).

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See also *Liu Yiu Keung Stephen v Keen Lloyd Resources Ltd (in Liq)* [2007] 1 HKC 605 where the plaintiff was a receiver of the company who sued in his own name, held agent cannot bring suit in his own name on behalf of disclosed principle. See s 183 of the Contracts Act 1950.

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[15] In any event not all the monies being claimed by the plaintiffs on behalf of the investors are due at the date of filing of this action. This is clear from the schedule attached to the statement of claim showing the due dates of the sums that are being claimed eg 7 March 2008. 53 out of 65 entries in schedule 1 are not due as at the date of filing of this action. Therefore there is no accrual of action in respect of their 53 investors. There is a serious material non-disclosure to this honourable court of the fact that 53 entries were not due when the Mareva injunction and mandatory injunction were

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A sought. A misleading impression was created that a total sum of RM4,918,940 was due when this application for injunction was filed.

[16] The facts do not support the plaintiffs' contention that they are authorised to pursue this claim for and on behalf of individual in schedule 1.
B In fact out of all the eight affidavits that have been filed today by the plaintiffs, three deponents do not even feature in schedule 1. They are:

- (i) Namilatun Sa'diah bt Mohd Nawi
- (ii) Lavinie Thiruchelvam
- C (iii) Nazril bin Mohd Idrus

[17] There is no dissipation of assets as the plaintiffs would want this court to believe. The monies alluded to in the respective investment agreement
D requiring the company to pay the investors on 7 of every month were in fact paid out to the investors by the first defendant. As at the date of the filing of this suit by the plaintiffs no sums were outstanding in so far as the monthly payment is concerned. As at 28 January 2008 the first defendant paid a sum of RM1.305m to the plaintiffs. This fact was not disclosed to the honourable
E court on 18 February 2008 when this application for injunction is made. See encl 15 exh 'CCH-8'. From October 2005 the first defendant also made payment through cash and cheques to the investors amounting to approximately RM1.9m. See exh 'CCH-5' of encl 15. This has not been disclosed by the plaintiffs on 18 February 2008 when the plaintiffs applied
F for the ex parte injunction.

[18] Material non-disclosure. See *Rex v Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 KB 486 at pp 505 and 514: full and frank disclosure is required in all ex parte
G applications. In this instance it should have been brought to the attention of the court that a substantial part of the money being claimed was not due yet at the date of filing of this action. It was also not disclosed that as at 28 January 2008 the first defendant had paid a sum of RM1.305m to the plaintiffs. Further the plaintiffs had also not disclosed that the first defendant
H had also made payment through the investors amounting to RM1.9m direct to the investors. See also *Lim Sung Huak & Ors v Syarikat Pemaju Tanah Tikam Batu Sdn Bhd* [1993] 3 MLJ 527. A fortiori for Mareva injunction — see *Lloyds Bowmaker Ltd v Britannia Arrow Holdings Plc* [1988] 1 WLR 1337: there must be material disclosure otherwise there would be an abuse of court
I process. See *Arthur Anderson & Co v Interfood Sdn Bhd* [2005] 6 MLJ 239 ; [2005] 2 CLJ 889 at pp 906–908. It is to be noted that in the instant case the plaintiffs were claiming for the return of RM4.918m without deducting the sum that they had received from the first defendant. We have paid

altogether to the first plaintiff the sum of RM3.2m as evidence in the banking slip and sign acknowledgement from the plaintiffs.

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CONTINUED SUBMISSION BY THE DEFENDANTS (NEW COUNSEL) MR CHRISTOPHER LAI KING LUNG: (VERBATIM)

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[19] The first defendant has paid RM3.2m to the plaintiffs as agent for their friends (investors). This is exhibited in 'P-3' of the fourth affidavit of first defendant affirmed on 22 July 2008. The plaintiffs are exaggerating the fact of the claim of RM4.9m without taking into account the sum of RM3.2m that has been paid by the first defendant to the plaintiffs. The plaintiffs' claim is premature in that only 12 individuals out of 65 listed in schedule 1 had matured. Out of 12 individuals here only five can show the nexus or link with the OBL Company.

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[20] the first defendant had paid all monies to the 12 individuals concerned. This is exhibited in 'P-1' and 'P-2' of the fourth affidavit of the first defendant affirmed on 22 July 2008.

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[21] Exhibit 'P-2' clearly shows that only a sum of RM237,440 is due from the five individuals but the first defendant had already paid RM3.2m to the plaintiffs for them to be distributed to their friends. Out of 12 individuals from the 65 entries in the schedule 1 of statement of claim the total amount outstanding is RM919,452.80 for all capitals and dividends due. Again the first defendant had paid a sum of RM3.2m to the plaintiffs, a sum which is more than enough to cover the outstanding loan. As such based on the exhs 'P-1', 'P-2' and 'P-3' the defendants are not owing anything to the plaintiffs. On the contrary the plaintiffs had failed to explain whether they had distributed or paid the RM3.2m to their friends.

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[22] Had the RM3.2m been disclosed, the court would be reluctant to grant the injunction on 18 February 2008.

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[23] The first defendant also had paid RM100,000 to one named Maram bin Mohamed as listed in No 65 of schedule 1 to the statement of claim. This can be seen in para 9 of encl 15. However the plaintiffs still incorporated his name to exaggerate the amount here.

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[24] The plaintiffs also failed to justify to the court that they had utilised a total amount RM186,671.20 from the RM1.3m received from the first defendant for their own purpose labelled as introducer's fee, the plaintiffs' office expenses, the plaintiffs' lawyer fee in exh 'ZS-12' in encl 30.

- A** [25] The plaintiffs also unlawfully claimed to disclose RM5,500 from the money paid by the first defendant to set up a new company. This can be seen in para 31(e) encl 11.
- B** [26] The plaintiffs also failed to disclose a material fact on arrangement of earlier solicitor ie Mr Genesh and Mr Rajah and all circumstances which led to the guarantee and indemnity agreement being signed by the first and second defendants under undue influence, coercion, duress and fraud. This can be seen in para 52.8 encl 15 and para 37 of encl 11.
- C** [27] The plaintiffs had admitted that they had used duress and undue influence against the first and second defendants in concluding the guarantee agreement. This rendered the agreement signed as invalid.
- D** [28] There is also non-disclosure of material facts that in the absence of the company resolution for third defendant, the agreement is not binding on the third defendant.
- E** [29] Non-compliance with O 29 r 1(2A) of the Rules of the High Court 1980 — non-disclosure. See O 29 r 1(2A)(a), (b) and (e) of the Rules of the High Court 1980. In this regard the plaintiffs had failed to disclose:
- F** (i) RM3.2m paid by the first defendant;
- (ii) RM100,000 paid by the first defendant to one Maram bin Mohamed;
- G** (iii) 53 out of 65 entries in the statement of claim were not due;
- (iv) all circumstances and duress leading to guarantee being signed;
- (v) absence of company resolution to authorise the signing of the guarantee agreement.
- H** [30] The plaintiffs also failed to comply with O 29 r 1(2A)(d) of the Rules of the High Court 1980 in that the plaintiffs had failed to disclose to this court the following:
- I** (i) the likely defence by the defendants that the plaintiffs' claim is premature;
- (ii) the likely defence by the defendants that the plaintiffs' lack of locus standi which was purportedly a representative action to recover their 'friends' money' and not plaintiffs;
- (iii) the likely defence by the defendants that the plaintiffs' lack of cause of action against the defendants as there is no contractual obligation between the plaintiffs and the defendants;

- (iv) the likely defence by the defendants that they have paid the total amount of RM3.2m to the plaintiffs. Clearly nothing was due to the plaintiffs; A
 - (v) the likely defence by the defendants that the plaintiffs were not entitled to reliefs of RM4.9m which were not entitled for themselves. B
- [31] There is also non-compliance of O 29 r 1(2A)(c) of the Rules of the High Court 1980 in that the plaintiffs had failed to notify the defendants on 13 February 2008 and on latest by 18 February 2008 of their intention to file the ex parte injunction as required by law. C
- [32] No satisfactory explanation was offered by the plaintiffs as to why such notice was not given to the defendants on 13 February 2008 or 18 February 2008. D
- [33] The first and second defendants only came to know of the existence of the ex parte order on the 25 February 2008 as can be seen in para 4 of encl 39. There was clearly non-compliance of O 29 r 1(2A)(c), the provision of which is mandatory. E
- [34] There is no risk of dissipation of assets by defendants bearing in mind the risk of dissipation must not be just a mere possibility but almost a certainty. However the plaintiffs merely making a unilateral wild assumption without any concrete proof which was vigorously disputed by defendants. The plaintiffs' accusation is just the plaintiffs' version of their own personal belief which has not been substantiated with any concrete proof. F
- (i) The plaintiffs are aware and knew based on the advice of the plaintiffs' previous solicitor Mr Rajan the first defendant had to change his telephone number and had given the telephone number to the first plaintiff because the first plaintiff was the mouthpiece for their friends. This can be seen in para 49 of encl 15. As such the first defendant can be contactable by the first plaintiff at all material times and within the first plaintiff's knowledge of his new telephone number. G H
 - (ii) Due to the investigation by the Securities Commission Mr Rajan had advised the first defendant to transfer the money to a new account to be opened by the second defendant and her mother to avoid freezing of their account by the Securities Commission. Paragraphs 35 to 37 of encl 15. I
 - (iii) The plaintiffs at all material times approved the said transfer and knew of the arrangement to avoid the friends' money being frozen by the Securities Commission. Paragraphs 36 to 37 of encl 15.

- A** (iv) The transfer of money to Ong First Trading Pte Ltd was within the plaintiffs' knowledge and in fact exhibited by plaintiffs in their exh 'ZS-4' in encl 6.
- B** (v) The plaintiffs have made a baseless accusation against the first defendant for using RM500,000 from the investment account to set up the third defendant company. This is contrary to common logic as the paid up capital for setting up the third defendant company is only RM300,000 contributed personally by the first and second defendants by their own personal account with their own personal cheque. See paras 9 to 11 of encl 11.
- C** (vi) The plaintiffs knew and aware of the transfer of account from Refco (Singapore) Pte Ltd to Philip Futures Pte Ltd and Man Financial Pte Ltd due to the worldwide bankruptcy protection secured by Refco as evidenced in exh 'CCH-3' of encl 15. See also para 18 of encl 15.
- D** (vii) Further the plaintiffs had full and complete detail of all transactions done by the first defendant via a shared e-mail account in www.boom888@gmail.com. See para 5.2 encl 43 which was subsequently used by the plaintiffs in their affidavit.
- E** (viii) The second defendant being the first defendant's girlfriend had volunteered to assist the first defendant due to the threats and undue influence from plaintiffs via their sms as exhibited in para 34 in encl 11. In this regard the draft plan that was drawn up in exh 'ZS-6' para 42.1 encl 15 and unaudited account in exh 'ZS-9' were for mutual discussion. No agreement or consensus was reached between the plaintiffs and defendants.
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G [35] Abuse of process of court by the plaintiffs/unclean hands — the plaintiffs had abused the process of court by filing a suit against the defendants in which there was no locus to do so. The plaintiffs are purportedly claiming for their friends' money which has never been authorised by their friends.

H REPLY BY MR VINOD KAMALANATHAN: (VERBATIM)

I [36] Locus standi of the two plaintiffs both are collectors of the deposit as well as distributors of the payment received from the first defendant. The two plaintiffs' names appear in all the investment agreements and they signed on each of them.

[37] With respect to dividends as of 7 February 2008 all have not been paid. Capitals which have been matured have also not been paid and the capital as of 7 November 2007 has not been paid. There is not a shred of

evidence that payment on the 7 February 2008 for dividends has been paid even in the affidavit affirmed by the first defendant on 22 July 2008.

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[38] Dissipation of assets. See admission by the first defendant in encl 15 paras 36 to 37 that the monies deposited by the plaintiffs were used by the girlfriend and her mother to open trading account with Ong First Trading Pte Ltd. See paras 39 and 40 of the plaintiffs' affidavit in support (encl 6) stating that both the defendants admitted in a meeting using RM500,000 of the investment sum to start up the third defendant company. Company search of the third defendant has also been exhibited and the directors are the second defendant and one Chong Peh Ling. The only shareholders are the first and second defendants holding equal shares of 150,000 each.

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[39] Evidence that the sum deposited plus dividend had not been returned to the plaintiffs. See paras 36 to 37 of the plaintiffs' affidavit in support saying in general that the first defendant did not pay the monthly dividend and capital due.

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Further submission by leave of court counsel for the defendants Mr Christopher Lai King Lung on the two points just raised in the reply of plaintiffs' counsel

[40] The second defendant's involvement:

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- (i) The transfer of monies to Ong First Trading was within the plaintiffs' knowledge and consent. This can be seen in para 37 of encl 13 and the plaintiffs even exhibited the said in exh 'ZS-4' in encl 6 of the plaintiffs' affidavit in support;
- (ii) With regards to the third defendant, all unilateral assertions submitted by plaintiffs were merely based on the plaintiffs' affidavit in encl 6 and not the defendants' affidavit in which the defendants have disputed vigorously in all the defendants' affidavits. In fact there is no proof at all the RM500,000 were taken to set up the third defendant company. The paid-up capital contributed personally by the first and second defendants via a personal account with proof of their own personal deposit. This can be seen in paras 9–11 in encl 11. The names of the two directors are the second defendant and one Chong Peh Ling who are not even a party to this application;
- (iii) With regards to the evidence of capital and dividend which were not returned — it is misleading by my learned friend to submit that the defendants had admitted the sum claimed in which in all the defendants' affidavits had not made this admission at all.

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FINDINGS AND DECISION

[41] The following passage from *Malaysian High Court Practice* 2002 Desk Ed summarises the requirement for the issuance of a Mareva injunction:

- A In determining whether a Mareva injunction should be granted, the following considerations will be taken into account.

First, there must be a strong prima facie case against the defendant: *Nippon Yusen Kaisha v Karageorgis* [1975] 1 WLR 1093; *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509; *Rasu Maritime SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* [1978] 1 QB 644; *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG* [1984] 1 All ER 398; *Pacific Centre Sdn Bhd v United Engineers Bhd*, above; *S & F International Ltd v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62; *Ace King Pte Ltd v Circus American Ltd* [1985] 2 MLJ 75; *Bank Bumiputra Malaysia Bhd v Lorrain Osman* [1985] 2 MLJ 236; *Creative Furnishing Sdn Bhd v Wong Koi* [1989] 2 MLJ 153; *Tansa Enterprise Sdn Bhd v Temenang Engineering Sdn Bhd* [1994] 2 MLJ 353; *Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd*, above. See also *Biasmas Sdn Bhd & Ors v Kan Yan Heng & Anor* [1998] 4 MLJ 1 (CA): to show a good arguable case, it would generally be sufficient to show on the evidence available that there is a fair chance that the plaintiffs will obtain judgment against the defendants; there is no need to show a case so strong as to warrant summary judgment or even a strong prima facie case.

Secondly, there must be clear evidence that the defendant has assets within jurisdiction: *Third Chandris Shipping Corp v Unimarine SA* [1979] 2 All ER 972; *Pacific Centre Sdn Bhd v United Engineers Bhd*, above; *Ace King Pte Ltd v Circus American Ltd*, above; *Bank Bumiputra Malaysia Bhd v Lorrain Osman*, above.

Thirdly, there must be a danger that the defendants assets may be dissipated before judgment: *Mareva Compania Naviera SA v International Bulkcarriers*, above; *Third Chandris Shipping Corp v Unimarine SA*, above; *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG*, above; *Pacific Centre Sdn Bhd v United Engineers Bhd*, above; *Bank Bumiputra Malaysia Bhd v Lorrain Osman*, above; *S & F International Ltd v Trans-Con Engineering Sdn Bhd*, above; *Creative Furnishing Sdn Bhd v Wong Koi*, above. In addition to the aforementioned requirements, the plaintiff must give an undertaking in damages as security should the injunction turn out to be unjustified.

G A third party against whom the plaintiff had no cause of action may be joined as a defendant under O 15 r 6(2)(b)(ii) and a Mareva injunction may be issued against him if it can be shown that the third party was holding the assets of the defendant: *Teo Siew Har v Lee Kuan Yew* [1999] 4 SLR 560, (CA).

H [42] The plaintiffs' claim in essence is for the return of monies they had invested with the first defendant purportedly for and on behalf of a number of persons vide the respective agreements which they had signed with the first defendant less whatever sum that had been paid by the second defendant to the plaintiffs as dividends. It is true that the agreements appeared on the face of them to have been entered into between the persons (the investors) whom the plaintiffs claimed to have represented. But the plaintiffs had also signed on the agreements. The plaintiffs' locus standi to sue in their names is therefore an issue which is not to be decided at this interlocutory stage.

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[43] The plaintiffs had shown in their affidavit that certain dividends in respect of each of the deposits had not been paid to the defendants for the benefit of the investors when they were due. The plaintiffs have also shown that the guaranteed return of the principal sums invested had been due but was not returned to the investors as agreed in the agreements.

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[44] The second defendant's involvement in the scheme is clear in that she had assisted in moving the money in the account of the third defendant company into the joint account with her mother which they opened with Ong First Trading Pte Ltd, a security company.

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[45] The third defendant company's involvement in this claim is clear from para 32(c) of the supporting affidavit of the plaintiffs (encl 6) alluding to the meeting held in September 2007 as follows:

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Kedua-dua defendan-defendan pertama dan kedua telahpun menggunakan wang berjumlah RM500,000 daripada wang rakan-rakan kami untuk memulakan dan mendirikan sebuah syarikat yang dikenali sebagai InQVenture Sdn Bhd, iaitu defendan ketiga. Wang kapital yang diberikan oleh rakan-rakan saya dan plaintiff kedua telahpun digunakan untuk mendirikan pemiagaan peribadi kedua-dua defendan ini yang dinamakan sebagai 'In Q Box' dan perniagaan ini adalah bertempat di pusat membeli belah *One Utama*. Sekarang dikemukakan dan ditunjukkan kepada saya ditandakan sebagai 'ZS-5' adalah sesalinan carian syarikat In Q-Venture Sdn Bhd. Saya baru mendapat tahu melalui carian syarikat ini bahawa defendan ketiga telahpun ditubuhkan pada 5 Oktober 2006.

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[46] The first defendant in his affidavit in reply denied having made admission that the third defendant company was set up using the monies from the deposits but contended that the company was set up in October 2006 (after the deposits were taken) using monies from their own personal bank account.

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[47] He had however failed to show where the money from his personal bank account came from.

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[48] The defendants' contention that there had been non-disclosure of the fact that the plaintiffs had not disclosed some monies which had been paid to them for the benefit of the investors does not tantamount to a non-disclosure of material facts as such but rather a matter of accounting of how much dividends had been paid out at the end of the day.

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[49] That the defendants have assets in the jurisdiction are clear and need no elaboration.

- A** [50] There is a real danger of dissipation on the following grounds:
- (i) The transactions have almost certainly appear to have contravened s 25 of the Banking and Financial Institutions Act 1989 which read as follows:
- B**
- 25 Receiving, taking or acceptance of deposits prohibited, except under and in accordance with a valid licence granted under section 6(4)
- C** (1) No person shall receive, take, or accept deposits except under and in accordance with a valid licence granted under section 6 (4) to carry on banking, finance company, merchant banking or discount house business.
- D** (2) The provisions of subsection (1) shall have full force and effect notwithstanding anything contained in any other written law, and, in particular, notwithstanding anything contained in the Companies Act 1965 in respect of borrowing corporations as defined in section 4 of that Act.
- E** (3) For the purposes of this section, the definition of ‘deposit’ in section 2 is modified by —
- F** (a) substituting for the words ‘received or paid’, the words ‘or any precious metal, or any precious stone, or any article which is comprised, in part or in whole, of any precious metal or precious stone, and any other article or thing as may be prescribed by the Minister, on the recommendation of; the Bank, received, paid or delivered’;
- G** (b) by inserting after the words ‘repaid’, ‘repayable’, ‘repayment’ and ‘payment’ the words ‘or returned’, ‘or returnable’, ‘or return’, and ‘or delivery’, respectively.
- H** The illegal conduct of the first defendant imputes dishonesty giving rise to a real danger of dissipation.
- (ii) Both the dividends and return of principal sum had not been paid.
- (iii) Evidence of the second defendant that monies taken from the deposits were invested in the share trading account in the name of the second defendant and her mother.
- I**

ENCLOSURE 4

[51] There shall be order in terms except for paras 1(p) and 3.

[52] Enclosures 12 and 16 (application to set aside) dismissed with costs. A

[53] The defendants to provide accounts of the expenditure pursuant to the order of the court releasing the sum of RM30,000 on 6 March 2008 to enable the third defendant to pay its staff.

B

ORAL APPLICATION FOR STAY EXECUTION BY COUNSEL FOR THE DEFENDANTS PENDING APPEAL

[54] We have strict instructions from our clients who had categorically denied any sums owed to the plaintiffs. In fact the defendants had paid a sum of RM3.2m to the plaintiffs which they had kept it and not explained whether they have paid to the investors.

C

[55] The plaintiffs are not the aggrieved party in the claim for relief.

D

[56] The Mareva injunction is widely worded in the sense that all the first and second defendants' properties and bank accounts are frozen and they are facing numerous suits against the third defendant together with the first and second defendants from all the suppliers which effectively will kill off the third defendant pending the full trial.

E

[57] There are also no living expenses for the first defendant to carry on his living.

F

[58] There is no allocation for payment of legal fees for the defendants to defend this case.

COUNSEL FOR THE PLAINTIFFS DISAGREES

G

[59] There is nothing to stay because this is not an execution order. This is in fact a Mareva injunction which actually stops dissipation of assets when the matter is pending trial as held by this court.

H

[60] Application for stay dismissed.

Claim allowed.

Reported by Augustine Soosay I